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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

In re N.B. et al., Persons Coming Under the Juvenile
Court Law.

C088551

EL DORADO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,
Plaintiff and Respondent,

(Super. Ct. Nos.
SDP20180009, SDP20180010,
SDP20180011)

v.

A.D.,

Defendant and Appellant.

A.D., the mother of minors N.B., C.D., and B.D., appeals from the juvenile court's order terminating her parental rights. (Welf. & Inst. Code, §§ 366.26, 395.)¹ She contends the juvenile court erred in (1) failing to apply the beneficial parental relationship exception as to N.B., and (2) failing to continue the matter pursuant to section 366.26, subdivision (c)(3).

¹ Undesignated statutory references are to the Welfare and Institutions Code.

We conclude the exception to adoption does not apply, and that difficulties in finding an adoptive placement did not mandate a continuance. We will affirm the juvenile court's order.

BACKGROUND

In April 2018, mother resided with her husband (the father of C.D. and B.D., hereafter father), the minors, mother's sister G., and G.'s boyfriend. G. called law enforcement when father hit mother and threatened to kill her. N.B. tried to intervene at one point.

Mother had injuries on her face but told law enforcement she did not want to press charges against father. The home's refrigerator was outside because of the smell after the power had been cut off. N.B. told a social worker she had seen mother and father fight before, but never as severe.

Mother told the social worker she and father had been married for six years. She admitted that both she and father have a problem with methamphetamine and that father also abuses alcohol. She said the couple also argued about finances. Mother had stopped using drugs but then relapsed due to stress with father. She admitted that she would now test positive for methamphetamine, cocaine, and marijuana. In an interview from jail, father admitted relapsing with drugs due to work stress.

Mother and father had an extensive child welfare history. There were 13 prior referrals including open cases from April 15, 2005 to June 8, 2007, December 16, 2010 to April 13, 2012, and March 31, 2015 to December 30, 2016. The cases were based on domestic violence, drug use, or a combination of the two. Mother's oldest child M. does not reside with her, living instead with the child's father in Arizona.

In April 2018, the El Dorado County Health and Human Services Agency (Agency) filed dependency actions alleging jurisdiction of all three minors pursuant to section 300, subdivision (b)(1) on the basis of domestic violence, drug and alcohol abuse,

and child welfare history. The juvenile court detained the minors into foster placement later that month.

The May 2018 jurisdiction and disposition report recommended bypassing services for the parents. The report noted that prior court-ordered services for mother and father had included, but were not limited to, inpatient and outpatient substance abuse treatment, random drug/alcohol testing, anger management classes, individual counseling, and parenting and domestic violence services.

N.B. and C.D. appeared to be in good physical health. B.D. was diagnosed with jaundice shortly after her birth and was hospitalized for a week. Soon after, she was diagnosed with corona virus, which causes infections in the ear, nose, and upper throat. B.D. has chronic ear infections, sleep and mixed apnea, asthma, a heart murmur, and was sick all the time. C.D. was developmentally on target, but mother requested testing for B.D. at Alta Regional Center because of a speech delay. Mother believed all three minors needed counseling due to the domestic violence they witnessed.

Mother had weekly two-hour visits with the minors. On the first visit mother was unable to attend to all three children. Her behavior raised concerns that she was under the influence of a controlled substance during the visit. Subsequent visits improved with mother demonstrating her ability to attend to all three children.

A July 2018 addendum report noted that N.B., C.D. and B.D. were in new foster placements. The move was a result of the third 7-day notice, all based on behavior. N.B. would be placed with her maternal aunt and uncle in Walnut Creek, with whom she had been placed in a previous dependency. B.D. adjusted to and was doing well in her current placement. C.D. continued to struggle in his current placement, showing persistent behavior issues such as physical aggression to other children. C.D. would urinate around the home when he did not want to follow instructions. He would have emotional outbursts when he did not get his way and he was resistant to guidance and authority.

Mother entered an inpatient substance abuse program on April 23, 2018, exiting on June 1, 2018 to relocate to an area closer to her children. She arranged for services on her own, requiring minimal assistance from the Agency. She was attending outpatient substance abuse treatment, domestic violence counseling, behavioral health treatment, and drug and alcohol testing. She maintained regular visits with the minors.

In a June 2018 interview, N.B. told a social worker she wanted to return to mother's care. When asked about father, N.B. cried and said she did not want to see him. N.B. talked about witnessing domestic violence between mother and father; she cried and expressed how unsafe she felt when witnessing the domestic violence and feeling scared about her mother's safety. Father was sentenced to a five-year state prison term on June 9, 2018.

The juvenile court sustained the petitions and ordered no services for the parents at a July 2018 jurisdiction and disposition hearing. Mother filed a section 388 petition seeking reunification services, but the juvenile court denied the petition.

A November section 366.26 report stated that C.D. and B.D. were placed together in a foster home where they resided since August 7, 2018. N.B. remained in the Walnut Creek placement since July 3, 2018. N.B. and C.D. were healthy. B.D. was diagnosed with Esotropia of the left eye, a condition where one eye turns inward. She was referred to a specialist. The minors were all on track developmentally. N.B. was adjusting to her new school and C.D. was doing well in preschool. N.B. was undergoing counseling services, and it was anticipated that C.D. would be undergoing mental health services over the next several weeks.

Mother had two hours of visitation twice per month. She was consistent with her visits except for cancelling one to attend a funeral. She appeared to be appropriate, prepared, and engaged during her contact with the minors. N.B. looked forward to the visits.

The minors had changed placement four times since their detention. C.D.'s behavior required supervision and redirection, which raised a concern regarding adoptability. In addition, the foster parents for C.D. and B.D. were unsure if they were willing to take N.B. due to having limited space in the home and multiple minors. N.B.'s aunt and uncle were open to adopting her but would not be able to adopt C.D. and B.D. as they had their own biological children. The Agency nevertheless concluded the minors were adoptable, and it engaged in efforts to find adoptive homes for the minors, including as a sibling set.

The November section 366.26 report also noted that mother found a live-in treatment program. She participated in random drug testing, group sessions and individual therapy, she worked with a life coach, and she attended three 12-step meetings a week. Mother's current drug tests were negative, and she was employed at a shoe store.

Although the Agency acknowledged mother's accomplishments, the report said this was her third dependency case. In each case she was capable of making the changes needed to achieve reunification, but once the Agency oversight was removed, old patterns of behavior would reemerge. Over the long term, the Agency said the parents had failed to show an ability to maintain sobriety, to refrain from domestic violence, or to provide their children with a safe and stable home.

Mother filed another section 388 petition seeking reunification services. She also moved for separate minor's counsel, asserting that a conflict may have arisen between N.B. and the other minors. The juvenile court denied both requests, concluding with regard to the section 388 petition that there was no showing of changed circumstances.

At the December 2018 section 366.26 hearing, a social worker testified that N.B. said she continued to want to see mother. N.B. was teary and frightened that her relationship with mother would be severed. The social worker believed N.B. had a positive relationship with mother and would benefit from continuing that relationship. But the social worker ultimately testified that termination would not be detrimental to

N.B. According to the social worker, what the minors needed most was permanency, as they did not have much stability during their lives. The sibling relationship was positive, and the social worker preferred placement of the minors together in an adoptive home with some kind of contact with mother.

Mother testified she consistently visited the minors. N.B. tried to extend their visits for as long as possible. Mother scheduled visits in advance so she could tell N.B. when they could see each other again. N.B. would tell mother about N.B.'s friends, her school and her homework, and N.B. would seek mother's advice, such as how to deal with bullies at school. Mother's counsel argued for the beneficial parental relationship exception for adoption based on N.B.'s bond with mother.

The juvenile court found clear and convincing evidence that the minors were likely to be adopted, it said an exception was not appropriate, and it terminated parental rights.

DISCUSSION

I

Mother contends the juvenile court erred in terminating parental rights because the beneficial parent-child relationship exception applied as to N.B. We disagree.

At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must choose one of the several “ ‘possible alternative permanent plans for a minor child. . . . The permanent plan preferred by the Legislature is adoption. [Citation.]’ [Citation.] If the court finds the child is adoptable, it must terminate parental rights absent circumstances under which it would be detrimental to the child. [Citation.]” (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368, italics omitted.)

There are only limited circumstances which permit the court to find a “compelling reason for determining that termination [of parental rights] would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).) Such circumstances include when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from

continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i) [beneficial parental relationship exception].)

To prove that the beneficial parental relationship exception applies, the parent must show there is a significant, positive emotional attachment between the parent and child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The parent must also prove that the parental relationship “ ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ ” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) “In other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) On the other hand, “ ‘[w]hen the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent[-]child relationship, the court should order adoption.’ [Citation.]” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

“Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1350.) “Adoption is the Legislature’s first choice because it gives the child the best chance at [a full emotional] commitment from a responsible caretaker. [Citations.]” (*Id.* at p. 1348.) The beneficial parental relationship exception is an exception to the general rule that the court must choose adoption where possible, and it “must be considered in view of the legislative preference for adoption when reunification efforts have failed.” (*Ibid.*)

The party claiming the exception has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.) The factual predicate of the exception must be supported by substantial evidence, but the juvenile court exercises its discretion in weighing that evidence and determining detriment. (*In re K.P.* (2012) 203 Cal.App.4th 614, 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

Mother relies primarily on *In re E.T.* (2018) 31 Cal.App.5th 68, which held the beneficial parental relationship exception applied. (*Id.* at p. 70.) But that case is distinguishable. Here, mother had more prior dependencies, establishing a cyclical pattern of behavior. Also, unlike the mother in *E.T.*, here mother did not self-report her drug use or the domestic violence that endangered the minor's welfare. Moreover, while N.B. loved her mother and wanted to be with her, there is no evidence she acted out as a result of her separation from mother, further distinguishing *E.T.*

Substantial evidence supports Agency' claim in the juvenile court that mother had a pattern of endangering her children's welfare, acting appropriately during the dependency but then resuming prior behaviors once jurisdiction ended. It was not an abuse of discretion to find N.B.'s relationship with mother did not overcome the benefit of adoption.

II

Mother next contends the juvenile court erred in declining to continue the matter 180 days pursuant to section 366.26, subdivision (c)(3). She argues there is substantial evidence that the minors were difficult to place.

Section 366.26, subdivision (c)(3) states in pertinent part: "If the court finds that termination of parental rights would not be detrimental to the child pursuant to paragraph (1) and that the child has a probability for adoption but is difficult to place for adoption and there is no identified or available prospective adoptive parent, the court may identify adoption as the permanent placement goal and, without terminating parental rights, order

that efforts be made to locate an appropriate adoptive family for the child, within the state or out of the state, within a period not to exceed 180 days.”

To terminate parental rights, “the [juvenile] court must find by clear and convincing evidence that it is likely that the child will be adopted.” (*In re Asia L.* (2003) 107 Cal.App.4th 498, 509; see also § 366.26, subd. (c)(1).) There must be “convincing evidence of the likelihood that adoption will take place within a reasonable time. [Citation.]” (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) On appeal, we must uphold the finding of adoptability and termination of parental rights if they are supported by substantial evidence. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

The issue of adoptability “focuses on the minor, e.g., whether the minor’s age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent ‘waiting in the wings.’ [Citations.]” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649, italics omitted.) But, “ ‘the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor’s age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent’s willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family.’ [Citation.]” (*In re Lukas B., supra*, 79 Cal.App.4th at p. 1154, italics omitted.)

Mother did not raise the issue of adoptability in the juvenile court, arguing only for the beneficial parental relationship exception. However, minor’s counsel did not know if terminating parental rights was in N.B.’s best interests without first knowing there was a place she could be permanently placed, and requested a section 366.26, subdivision (c)(3) continuance. But even if the request for a continuance from minor’s counsel preserved the issue on appeal as to N.B., minor’s counsel noted that although

N.B. loved her siblings, separation from them was not harming her in a way that would inhibit her adoptability. The record shows that although N.B. was 10 and part of a sibling group, she was nevertheless in good physical and mental health, she had no problems in any of her placements, and her foster parents -- her aunt and uncle -- were open to adopting her. On this record, substantial evidence supports the juvenile court's finding that N.B. was adoptable. The trial court did not abuse its discretion in denying the requested continuance.

DISPOSITION

The order terminating parental rights is affirmed.

/S/
MAURO, J.

We concur:

/S/
RAYE, P. J.

/S/
BLEASE, J.